

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

Court of Appeals of the District of Columbia

APRIL TERM, 1928.

No. 4821.

LOUIS GOLDBERG, APPELLANT,

vs.

COMMISSIONER OF INTERNAL REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

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Court of Appeals of the District of Columbia

No. 4821.

LOUIS GOLDBERG, Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE.

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Docket 11615.

LOUIS M. GOLDBERG, 872 Broadway, New York, N. Y.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

For the taxpayer: A. E. James, Esq.

For the Com'r: T. M. Mather, Esq.

Docket Entries.

1926.

Feb. 4. Petition received & filed.

“ 9. Copy of petition served on Solicitor.

“ 9. Notification of receipt mailed taxpayer.

Mar. 5. Answer filed by Solicitor.

“ 20. Copy of answer served on taxpayer. Assigned
General Calendar.

1927.

Apr. 6. Hearing date set 6-7-27.

June 7. Hearing had before Mr. Arundell on petitioner's
motion to continue. Continued to 6-14-27.

“ 8. Order of continuance to 6-14-27 signed & filed.
Both sides notified.

“ 14. Hearing had before Mr. Littleton on merits.
Briefs due in 30 days.

“ 21. Transcript of hearing 6-14-27 filed.

July 7. Brief filed by taxpayer.
1928.

Jan. 17. Findings of fact & opinion rendered Mr. Littleton.
Judgment will be entered on 15 days' notice,
under Rule 50.

“ 19. Motion for review by full Board filed by taxpayer.

“ 21. Hearing date set on motion 2-8-28.

“ 23. Copy of motion served on G. C.

Feb. 8. Hearing had before Mr. Littleton on motion of 1-19-28 (At hearing petitioner moves to amend, granted.) Motion for review denied. C. A. V.

“ 14. Memorandum & order denying petitioner's motion for modification of the Board's opinion promulgated 1-17-28 entered.

“ 21. Notice of settlement filed by G. C.

“ 24. Transcript of hearing 2-8-28 filed.

“ 27. Notice allowing taxpayer until 3-20-28 to file alternative settlement for hearing 3-29-28. Failure to do so, hearing 3-27-28.

“ 28. Motion & exception to order of 2-14-28 and consent to settlement filed by taxpayer.

Mar. 3. Order of redetermination entered.

July 16. Stipulation of venue filed. Court of Appeals of D. C.

“ 16. Petition for review with assignments of error filed by taxpayer.

“ 16. Proof of service filed.

“ 16. Præcipe with proof of service thereon filed.

Now, August 25, 1928, the foregoing docket entries certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

2 Filed Feb. 4, 1926, United States Board of Tax Appeals.

United States Board of Tax Appeals.

11615.

Appeal of LOUIS M. GOLDBERG, 872 Broadway, New York City, for the Year 1924.

Petition.

The above named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter dated December 18th, 1925, copy of which is attached.

(1) The taxes in controversy are Income Taxes for 1924 in the sum of \$957.78.

(2) The determination of the tax contained in the deficiency letter is based upon the disallowance as a deduction in his 1924 income tax of the taxpayer's loss for 1923 under Section 206 Revenue Act 1924.

(3) The facts upon which the taxpayer relies as the basis of his appeal are as follows: in filing his 1924 return the taxpayer deducted \$18,880.37 his net loss for 1923 under Section 206 of the Revenue Act of 1924. The Tax Department disallowed this deduction on the assumption that "*this loss was not incurred in his regular trade or business,*" and informed the taxpayer of an additional tax of \$957.78 due to the above disallowance.

It is respectfully submitted that prior to the Prohibition Act, the taxpayer was engaged in the family liquor business and that with the passing of the law he found it necessary to carry over a considerable stock of liquor. The taxpayer tried many times to dispose of this liquor
3 under permit, and in 1923 succeeded in making a few sales back to the distillery, thereby taking a loss of \$9,916.35. It is contended that the liquor business will continue to be a regular business of the taxpayer until his entire stock is disposed of.

During 1915 the taxpayer decided to go into the real estate business and in order to facilitate its administration

formed a corporation in which he owned all the stock. In 1920 he became interested in a piece of property in New Jersey and the mortgagee insisted upon having the property deeded to his person rather than the corporation since he felt he can better protect his mortgage. The taxpayer sold this property in 1923 and unfortunately was obliged to take a loss of \$20,083.74.

The taxpayer respectfully contends that a taxpayer may be engaged in more than one business at a time and that during 1923 he was as much engaged in the liquor business as he was in the real estate business. The taxpayer also contends that should he have been permitted to take title to the New Jersey property in the name of the corporation the saving to him by way of Income Taxes would have been much greater.

In view of the above facts it is contended that the taxpayer's 1923 loss was made in his "*regular business*" and it is respectfully requested that the deduction be allowed as originally taken by the taxpayer.

Wherefore the taxpayer respectfully prays that this Board may hear and determine his appeal.

LOUIS M. GOLDBERG.

4 STATE OF NEW YORK,
County of New York, ss:

Louis M. Goldberg being duly sworn says, that he has read the foregoing petition and is familiar with the statements therein contained, and that the facts therein stated are true except as are stated to be upon information and belief, and that those facts he believes to be true.

LOUIS M. GOLDBERG.

Sworn to before me this 29th day of January, 1926.

BERTHA SCHILLING,
Commissioner of Deeds, N. Y. City.

Cert'f filed N. Y. Co. Clk's No. 558, N. Y. Reg. Off. No. 26233.

Cert'f filed Bronx Co. Reg. Off. No. 3254.

Cert'f filed Kings Co. Reg. Off.

Commission expires Oct. 7, 1926.

5 Treasury Department, Internal Revenue Service,
New York, N. Y.

Office of the Collector Second District of New York, Custom
House, N. Y.

Account #663,358 NI.

December 18, 1925.

Louis M. Goldberg,
872 Broadway, N. Y. C.

SIR:

On November 14, 1925, you were notified of an apparent deficiency in your income tax for 1924 and advised of your privilege of filing a protest within thirty days from that date. No protest has been received in this office.

The correct amount of the deficiency has been finally determined to be \$957.78 (see attached explanatory statement). In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of this letter within which to file an appeal to the United States Board of Tax Appeals, Washington, D. C., contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with a final decision on such appeal has been made, no claim for abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Collector of Internal Revenue, Room 623, Custom House, New York. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items to which you agree. If you consent to the proposed assessment, notice and demand for payment will be sent you and promptly

upon receipt thereof you should forward the necessary remittance to the Collector attached to the notice and demand.

If you file an appeal with the United States Board of Tax Appeals you should notify this office of your action in order that the amount in dispute may not be assessed pending decision by that board.

	D. H. BLAIR,
	<i>Commissioner of Internal Revenue,</i>
(Signed)	By FRANK K. BOWERS,
	<i>Collector of Internal Rev.</i>

11/5/25.

Name: Louis M. Goldberg, 872 Broadway. Old Address: 295 North Village Ave., Rockville Center, N. Y.

Account No. 663,358.

Earned Income Computation.

Earned Income	10,000	Taxable at 2%	4,000	80.00
Less (Personal Exemption and Credit)	2,900.00	Taxable at 4%	3,100	124
Balance	7,100.00	Taxable at 6%		
Earned Income Credit of 25% of Total Tax on Earned Income			\$204	51

Revision of Tax Liability.

Net Income on original return	1,144.88	Tax due at 2%	80.00
Additional Income disclosed	18,880.37	Tax due at 4%	160.00
Corrected Net Income	20,025.25	Tax due at 6%	547.52
Surtax			221.26
			1,008.78

Personal Exemption & Credits..... 2,900.00

Earned Income Credit (not in excess of 25% of normal tax)

Subject to Normal Tax	17,125.25	mal tax)	51.00
Taxable at 2%	4,000.00	Total Tax due	957.78
Taxable at 4%	4,000.00	Tax previously assess....	None.
Taxable at 6%	9,125.25	Addl. Tax due	957.78

Explanation of Changes.

Examination of this taxpayer disclosed the following:

Prior to the prohibition act the taxpayer with a partner was in the liquor business. In 1915 a Real Estate corporation was formed with Mr. Goldberg being the president. This corporation is called the "8th Ave. & 53rd St. Realty Co., Inc." Mr. Goldberg's only income except interest received is the salary from this corporation. In 1920 he individually bought a piece of property in New Jersey and sold it in 1923 at a large loss. It is held that his loss sustained in 1923 from the sale of the property owned individually, may not be applied against 1924 income from the corporation as this loss was not incurred in his regular trade or business. His business being that of officer in the above named corporation since 1925 when the incorporation was formed the loss is not as defined in Sect. 206 Rev. Act 1924 appeal—copy.

T. RODEMEYER,
Int. Rev. Agent.

Now, August 25, 1928, the foregoing petition certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

7 Filed Mar. 5, 1926, United States Board of Tax
Appeals.

United States Board of Tax Appeals.

Docket No. 11615.

Appeal of LOUIS M. GOLDBERG, 872 Broadway, New York,
N. Y.

Answer.

The Commissioner of Internal Revenue by his attorney,
A. W. Gregg, Solicitor of Internal Revenue, for answer to

the petition of the above entitled taxpayer admits and denies as follows:

(1) It is admitted that the taxpayer is an individual, and that a deficiency letter was mailed to the taxpayer on December 18, 1925, proposing the assessment of a deficiency in tax for the year 1924, in the amount of \$957.78.

(2) It is denied that the taxpayer sustained a net loss during the year 1923 that he may deduct from income for the year 1924.

(3) It is denied that the business engaged in by the taxpayer for the year 1923 was that of a liquor dealer.

(4) Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

Proposition of Law.

Alleged net losses sustained in the year 1923 must be determined as defined in Section 204 (a) of the Revenue Act of 1921, and regulations promulgated thereunder.

Wherefore it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for the Commissioner
of Internal Revenue.

Of Counsel:

ROBERT A. LITTLETON,
Special Attorney,
Bureau of Internal Revenue.

Now, August 25, 1928, the foregoing answer certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

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United States Board of Tax Appeals.

Docket No. 11615.

LOUIS M. GOLDBERG, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated January 17, 1928.

A person may at the same time be regularly engaged in more than one kind of trade or business.

For twenty-one years prior to 1923 petitioner was regularly engaged in business as a wholesale liquor dealer. In the latter part of 1922 he ceased making purchases of additional stock but continued active efforts to sell and did sell during the year 1921 a quantity of the liquor on hand from which he sustained a loss. *Held*, that this was a business regularly carried on during 1923 and the net loss sustained in the operation thereof was deductible from net income for the year 1924.

From 1915 to and including the year 1923 petitioner was president and treasurer, and sole stockholder of a corporation engaged in the business of buying, selling, and renting real estate. In some instances petitioner entered into real estate contracts in his own name, transferring them later to the corporation. In 1920 he purchased in his own name a house and lot that he sold in 1923 at a loss. *Held*, that this was not a loss sustained in the operation of a business regularly carried on by petitioner within the meaning of section 204 of the Revenue Act of 1921, that may be carried forward and deducted from net income for the year 1924.

A. E. James, Esq., for the petitioner.

T. M. Mather, Esq., for the respondent.

The Commissioner determined a deficiency in income tax of \$957.78 for the calendar year 1924. It is claimed that the Commissioner erred in refusing to allow any deduction from 1924 income of the amount of net losses alleged to have been sustained in the year 1923 from a liquor business

9 and a real estate business claimed to have been regularly carried on during that year.

The position of the Commissioner is, first, that petitioner sustained no losses in 1923 and, secondly, if he did, they were not attributable to the operation of a trade or business regularly carried on by the taxpayer.

Findings of Fact.

Petitioner is a resident and citizen of the State of New York. For twenty-one years prior to the adoption of the Eighteenth Amendment to the Constitution of the United States and the enactment of legislation for its enforcement, petitioner was continuously engaged in business as a wholesale and retail liquor dealer. After the enactment of prohibition legislation he applied for and was granted a permit to purchase and sell liquor for medicinal purposes. He continued his liquor business in this manner until 1922. Thereafter he ceased purchasing liquors in the conduct of his business but continued active efforts throughout the year 1923 to sell the liquor on hand. He had a large quantity of liquor stored in bond and during the year 1923 he sold a portion thereof amounting to 470.4 cases and 40 barrels of liquor to permit holders. He sustained a net loss in 1923 in the operation of this business of \$2,408.65.

In 1915 petitioner organized a New York corporation to engage in the business of buying, selling, and renting real estate. From 1915 to and including 1923 petitioner was president, treasurer, and the sole stockholder of the corporation. He was actively engaged in the management of his affairs. In some instances petitioner entered into real estate contracts in his own name and transferred them later to the corporation. In 1920 he purchased in his own name a house and lot for which he paid \$37,500 and a commission of \$500, or a total purchase price of \$38,000. He believed at the time that this property was a good investment and that with certain improvements upon the building he could sell it at a good profit. The large dwelling house of about twenty rooms upon the lot was in a very dilapidated condition. Petitioner considered the value of the land to be equal to the price paid for

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the entire property. He practically reconstructed the house—the additions and improvements costing \$56,233.74, making the total cost of the property when sold in 1923 \$94,233.74. The property was sold in 1923 for a net price of \$74,150 after payment of the commissions and other necessary expenses of sale. The exhaustion, wear and tear of the building during the period of ownership by the petitioner was \$3,374. The loss sustained upon the sale was therefore \$16,709.74.

During the year 1923 petitioner received a salary from the corporation of which he was president of \$10,000, interest of \$1,159.47, and dividends of \$30, making a total of \$11,189.47. He paid local taxes of \$69.75, leaving an income of \$11,119.72. The Commissioner determined that petitioner's net income for the year 1924 was \$20,025. There is no controversy as to this.

Opinion.

LITTLETON: Section 204 of the Revenue Act of 1921 governing the questions here presented provides:

(a) That as used in this section the term "net loss" means only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer (including losses sustained from the sale or other disposition of real estate, machinery, and other capital assets, used in the conduct of such trade or business); and when so resulting mean the excess of the deductions allowed by section 214 or 234, as the case may be, over the sum of the following: (1) the gross income of the taxpayer for the taxable year, (2) the amount by which the interest received free from taxation under this title exceeds so much of the interest paid or accrued within the taxable year on indebtedness as is not permitted to be deducted by paragraph (2) of subdivision (a) of section 214 or by paragraph (2) of subdivision (a) of section 234, (3) the amount by which the deductible losses not sustained in such trade or
11 business exceed the taxable gains or profits not derived from such trade or business, (4) amounts received as dividends and allowed as a deduction under paragraph (6) of subdivision (a) of section 234, and (5) so much of the depletion deduction allowed with respect to

any mine, oil or gas well as is based upon discovery value in lieu of cost.

(b) If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

Although petitioner's liquor business as it had formerly been carried on was somewhat restricted by prohibition legislation and his conclusion at the end of 1922 to discontinue as soon as he could dispose of the liquor on hand, we are of the opinion from the evidence that he was regularly engaged in the sale of liquor as a business in the year 1923 and that the loss sustained in the operation of that business, amounting to \$2,408.65, is deductible from net income for the year 1924.

From the evidence in this proceeding we are of the opinion that the real estate loss of \$16,709.74 sustained by the petitioner in the sale of property hereinbefore mentioned was not a loss sustained in the operation of a trade or business regularly carried on by the petitioner within the meaning of section 204 of the Revenue Act of 1921.

The position of the Commissioner is that petitioner had no regular business, that he was merely an officer and employee of the corporation, all of the stock of which he owned. The question here is not whether the corporation may deduct the petitioner's net loss, nor whether the petitioner may deduct a loss of the corporation. For this reason this proceeding is to be distinguished from *Wm. J. Robb*, 5 B. T. A. 827, and *W. C. Harris*, 8 B. T. A. 1234.

12 Petitioner's activities during the year 1923, outside of his liquor business, were confined almost entirely to the management and furtherance of the business

of the real estate corporation. It appears from the evidence that over the period from 1915 to 1923, inclusive, he occasionally and for convenience made real estate contracts in his own name but these transactions were for and on behalf of the corporation and cannot be regarded as establishing that petitioner, as an individual, was regularly engaged in the real estate business within the meaning of the statute. The purchase in 1920 and sale at a loss in 1923 of the house and lot in New Jersey is the only real estate transaction in which petitioner engaged as an individual over a period of nine years. The testimony of petitioner as to whether this transaction was strictly a personal one or whether it was for or on behalf of the corporation is conflicting. Upon cross-examination petitioner testified:

Q. Did you individually purchase it, or the corporation?

A. If I purchased any property in some instances and they wanted me to go on the bond personally, I would take it in my name and transfer it to the corporation.

Q. Did you purchase the property for the corporation or yourself? A. If it is for the corporation or myself, it is the same thing, because I own the corporation.

* * * * *

Q. Did you transfer the New Jersey property to the corporation? A. No, I did not.

Q. Did you purchase it for the corporation? A. Yes.

* * * * *

13 Upon redirect examination the petitioner testified as follows:

Q. You testified, Mr. Goldberg, that the property in Deal, New Jersey, was bought for the corporation. Did you mean to so testify? A. Well, I always felt when I bought for the corporation or myself, it was all the same.

Q. Which way did you buy it? A. I did not buy it initially for the corporation. I bought it to sell.

Q. Who took title to it? A. I took title to it.

Q. Did you transfer it to the corporation? A. This property?

Q. Yes. A. No, I never transferred it.

Q. Who sold it? A. My attorneys.

Q. Who signed the deeds under which it was sold? A. I signed the deeds.

Assuming, however, that this real estate transaction was strictly carried out by petitioner on his own account as an individual, it was a single transaction in which he made an investment with the view of making a profit and was not sufficient to constitute a trade or business regularly carried on by him within the meaning of the statute. *J. J. Harrington*, 1 B. T. A. 11; *Fridolin Pabst*, 6 B. T. A. 843; *Harry J. Gutman*, 7 B. T. A. 500. Cf. *Pan-American Bank & Trust Co.*, 5 B. T. A. 839.

The Board is of the opinion that the real estate loss in question was not such a loss as may, under the statute, be used in determining the net loss for 1923 which may be carried forward and deducted from net income for the taxable year 1924. Petitioner's income, deductions, and losses for the year 1923 were as follows:

14 *Income:*

Salary	\$10,000.00	
Interest	1,159.47	
Dividends	30.00	\$11,189.47

Deductions:

Taxes paid		69.75
		\$11,119.72

Net loss from liquor business, \$2,408.65.

Real Estate Loss, \$16,709.74.

Under Section 204 (a) of the Revenue Act of 1921 petitioner is entitled to carry forward and deduct from net income for 1924 only the net loss of \$2,408.65 sustained in 1923 in the operation of his liquor business. Cf. *H. J. Schlesinger*, 5 B. T. A. 943.

Judgment will be entered on 15 days' notice, Under Rule 50.

Now, August 25, 1928, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

15 United States Board of Tax Appeals, Washington.

Docket No. 11615.

LOUIS M. GOLDBERG, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order of Redetermination.

Pursuant to the Board's findings of fact and opinion promulgated January 17, 1928, it is

Ordered and decided that there is a deficiency of \$720.50 in respect of the tax of this petitioner for the year 1924.

Enter:

(Signed) | B. H. LITTLETON,
Member U. S. Board of Tax Appeals.

Entered Mar. 3. 1928.

A true copy:

Teste:

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Now, August 25, 1928, the foregoing order of redetermination certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals

16 Filed Jul. 16, 1928, United States Board of
Tax Appeals.

United States Board of Tax Appeals.

Docket No. 11615.

LOUIS M. GOLDBERG, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

*Petition for Review in the Court of Appeals of the District
of Columbia.*

Now comes the petitioner, Louis M. Goldberg, by his attorney, A. E. James, and respectfully shows:—

I. That he is the petitioner in a certain proceeding heretofore heard and determined by the United States Board of Tax Appeals, and is a resident of the city, county and state of New York; that by stipulation herewith filed with the United States Board of Tax Appeals jurisdiction in this proceeding is conferred by agreement of the parties upon the said Court of Appeals of the District of Columbia.

II. The nature of the controversy is as follows, to wit: Two questions are presented:

- (1) Whether the petitioner was during the year 1923 engaged in the business of purchasing, selling and operating in real estate; and whether if he was engaged in such business during the said year he may deduct from income in 1924 as a net loss sustained in and for the said year 1923 the sum of \$7,998.67, representing the net loss sustained in that year after taking into account a loss on account of real estate of \$16,709.74.
- (2) Whether petitioner may deduct from income for the year 1924, the said sum of \$7,998.67 regardless of whether he was engaged in the real estate business in the year 1923.

The Board of Tax Appeals held—(1) that petitioner was not engaged in the real estate business in 1923; and, 17 secondly, that the provisions of Section 204 of the Revenue Act of 1921 were applicable in measuring the deduction allowable to petitioner, and that the provisions of Section 206 of the Revenue Act of 1924 were not applicable. The case was submitted to the Board on July 14, 1927. The order of the Board redetermining the deficiency was entered March 3, 1928.

III. The said petitioner being aggrieved by the conclusions of law contained in said decision, and by the said order of redetermination of the United States Board of Tax Appeals hereby petitions for a review thereof by the Court of Appeals of the District of Columbia, and prays that a transcript of the record be prepared in accordance with the rules of the said Court of Appeals of the District of Columbia and transmitted to the Clerk of said Court for filing, and appropriate action to the end that the errors com-

plained of may be reviewed and corrected by the said Court of Appeals of the District of Columbia.

IV. That the assignments of error of the petitioner are as follows:

(1) The Board of Tax Appeals erred in holding and deciding that petitioner was not engaged in the real estate business in the year 1923.

(2) The Board of Tax Appeals erred in holding and deciding that petitioner was entitled to deduct from net income for the year 1924 a net loss in only the amount of \$2,408.65, and in refusing to hold that petitioner was entitled to deduct from said income for 1924, a total sum of \$7,998.67.

18 (3) The Board of Tax Appeals erred in holding and deciding that the statutory provision under which petitioner's net income and allowance for net loss should be computed for the year 1924, was Section 204 of the Revenue Act of 1921 instead Section 206 of the Revenue Act of 1924.

(4) The Board of Tax Appeals erred in ordering and deciding that there is a deficiency of \$720.50 in respect of petitioner's tax liability for the year 1924.

LOUIS M. GOLDBERG.

STATE OF NEW YORK.

County of New York, ss:

Louis M. Goldberg, being duly sworn, deposes and says that he is the petitioner in the above-entitled matter; that he has read the foregoing Petition for Review in the Court of Appeals of the District of Columbia; and that the facts therein stated are true to his own knowledge.

LOUIS M. GOLDBERG.

Subscribed and sworn to before me this 27th day of June, 1928.

My commission expires on the 19 day of October, 1928.

[SEAL.]

BERTHA SCHILLING,

Commissioner of Deeds, New York City.

A. E. JAMES,

Attorney for Petitioner.

19 Filed Jul. 16, 1928, United States Board of
Tax Appeals.

United States Board of Tax Appeals.

Docket No. 11615.

LOUIS M. GOLDBERG, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Notice.

To C. M. Charest, General Counsel,
Bureau of Internal Revenue,
Washington, D. C.:

You are hereby notified that the petitioner in the above-entitled proceeding has on this 14 day of July, 1928, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the Court of Appeals of the District of Columbia of the decision of said Board in the above-entitled matter. A copy of the petition for review and assignments of error as filed is attached hereto.

A. E. JAMES,
Attorney for Petitioner.

Service is acknowledged this 14th day of July, 1928.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Now, August 25, 1928, the foregoing petition for review with notice of filing and admission of service certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

20 Filed Jul. 16, 1928, United States Board of
Tax Appeals.

United States Board of Tax Appeals.

Docket No. 11615.

LOUIS M. GOLDBERG, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation.

It is hereby stipulated and agreed by and between A. E. James, Attorney for Petitioner, and C. M. Charest, General Counsel, Bureau of Internal Revenue, that proceedings for review of the decision of the United States Board of Tax Appeals in the above-entitled matter may be taken and had in the Court of Appeals of the District of Columbia instead of in the Circuit Court of Appeals for the Second Circuit, of which Circuit petitioner is a resident and taxpayer, said jurisdiction being conferred upon the Court of Appeals of the District of Columbia by Section 1002 (d) of the Revenue Act of 1926.

A. E. JAMES,

Attorney for Petitioner.

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

Now, August 25, 1928, the foregoing stipulation of jurisdiction certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

21 Filed Jul. 16, 1928, United States Board of
Tax Appeals.

United States Board of Tax Appeals.

Docket No. 11615.

LOUIS M. GOLDBERG, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Præcipe.

To the Clerk of the United States Board of Tax Appeals:

You are requested to take a transcript of record to be filed in the Court of Appeals of the District of Columbia pursuant to the review taken in the above-entitled case and to include in such transcript of record, copies duly certified as correct, of the following documents:

1. The docket entries of proceedings before the Board.
2. Pleadings before the Board:
 - (a) Petition;
 - (b) Answer;
3. Findings of fact; opinion and decision of the Board, including final order of redetermination.
4. Petition for review, notice of filing of petition for review, admission of service, and stipulation of jurisdiction.
5. This Præcipe.

A. E. JAMES,
Attorney for Petitioner.

Service admitted this 14th day of July, 1928.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Now, August 25, 1928, the foregoing præcipe certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals, 1924.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Endorsed on cover: Board of Tax Appeals. No. 4821. Louis Goldberg, appellant, vs. Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Aug. 30, 1928. Henry W. Hodges, clerk.

(3323)

FOR MR. JUSTICE VAN DERBILT.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

IN THE
Court of Appeals of the District of Columbia

BRIEF FOR THE APPELLANT.

APRIL TERM, 1928.

No. 4821.

LOUIS M. GOLDBERG, APPELLANT,

vs.

COMMISSIONER OF INTERNAL REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

LEVI COOKE,
ALBERT E. JAMES,
Attorneys for Appellant.

IN THE

Court of Appeals of the District of Columbia

LOUIS M. GOLDBERG, <i>Appellant,</i> <i>vs.</i> COMMISSIONER OF INTERNAL REVENUE, <i>Respondent.</i>	}	No. 4821.
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BRIEF FOR THE APPELLANT.

This is a proceeding under Section 1001 of the Revenue Act of 1926 to review a decision of the United States Board of Tax Appeals. The petition for review was duly filed with the Clerk of the Board of Tax Appeals on July 16, 1928, less than six months after entry of order of redetermination in the said Board. Jurisdiction was conferred upon this Court by stipulation of the parties pursuant to Section 1002 of the Revenue Act. The facts of record below are certified as found by the presiding member of the Board.

Statement of Facts.

The facts as found by the Board are as follows:

Petitioner is a resident and citizen of the State of New York. For twenty-one years prior to the adoption of the Eighteenth Amendment to the Constitution of the United States, and the enactment of legislation for its enforcement, petitioner was con-

tinuously engaged in business as a wholesale and retail liquor dealer. After the enactment of prohibition legislation he applied for and was granted a permit to purchase and sell liquor for medicinal purposes. He continued his liquor business in this manner until 1922. Thereafter he ceased purchasing liquors in the conduct of his business but continued active efforts throughout the year 1923 to sell liquor on hand. He had a large quantity of liquor stored in bond and during the year 1923 he sold a portion thereof amounting to 470.4 cases and 40 barrels of liquor to permit holders. He sustained a net loss in 1923 in the operation of this business of \$2,408.65.

In 1915 petitioner organized a New York corporation to engage in the business of buying, selling, and renting real estate. From 1915 to and including 1923 petitioner was president, treasurer and the sole stockholder of the corporation. He was actively engaged in the management of his affairs. In some instances, petitioner entered into real estate contracts in his own name and transferred them later to the corporation. In 1920 he purchased in his own name a house and lot for which he paid \$37,500 and a commission of \$500 or a total purchase price of \$38,000. He believed at the time that this property was a good investment and that with certain improvements upon the building he could sell it at a good profit. The large dwelling house of about twenty rooms upon the lot was in a very dilapidated condition. Petitioner considered the value of the land to be equal to the price paid for the entire property. He practically reconstructed the house—the additions and improvements costing \$56,233.74, making the total cost of the property when sold in

16,769.74
 2,408.65
 14,361.09
 19,119.72
 3,757.63

1923 \$94,233.74. The property was sold in 1923 for a net price of \$74,150 after payment of the commissions and other necessary expenses of sale. The exhaustion, wear and tear of the building during the period of ownership by the petitioner was \$3,374. The loss sustained upon the sale was therefore \$16,709.74.

During the year 1923 petitioner received a salary from the corporation of which he was president of \$10,000, interest of \$1,159.47, and dividends of \$30, making a total of \$11,189.47. He paid local taxes of \$69.75, leaving an income of \$11,119.72. The Commissioner determined that petitioner's net income for the year 1924 was \$20,025. There is no controversy as to this.

The Issues on Appeal.

The issues raised on appeal are two:

(1) Whether the petitioner was during the year 1923 engaged in the business of purchasing, selling and operating in real estate; and whether if he was engaged in such business during the said year he may deduct from income in 1924 as a net loss sustained in and for the said year 1923 the sum of \$7,998.67, representing the net loss sustained in that year after taking into account a loss on account of real estate of \$16,709.74.

(2) Whether petitioner may deduct from income for the year 1924 the said sum of \$7,998.67 regardless of whether he was engaged in the real estate business in the year 1923.

$$\begin{array}{r}
 16,709.74 \\
 11,189.47 \\
 \hline
 5,520.27
 \end{array}$$

$$\begin{array}{r}
 7,928.92 \\
 69.75 \\
 \hline
 7,998.67
 \end{array}$$

Argument.

Considering first the question whether the appellant may deduct in 1924 such part of the loss of \$16,709.74 sustained in a real estate transaction in 1923 as does not exceed his net loss for the year 1923, a slight restatement of the facts may be helpful.

The appellant prior to Prohibition was a wholesale liquor dealer and in 1923 was winding up that business. In so doing he sustained a loss of \$2,408.65 (record, page 11), which the Board has held was a loss sustained in business in that year (record, page 15).

In the same year 1923 the appellant sold a house and lot bought by him as an investment and sustained a loss in that connection of \$16,709.74 (record, pages 11-12). During the year 1923, also, and for many years prior thereto, the appellant had carried on a real estate business through the medium of a personal corporation, in which he was the President, Treasurer, and the sole stockholder (record, page 11). This corporation was admittedly engaged in the business of buying, selling and renting real estate (record, page 11).

The excess of appellant's expenses and losses in 1923 over his income for that year was \$7,998.67, as follows:

Net loss liquor business (record, page 11)	\$ 2,408.65
Loss sale of real estate (record, page 12)	16,709.74
Total losses	\$19,118.39
Taxes paid (record, page 12)	69.75
Total losses and deduction	\$19,188.14

Salary (record, page 12)	\$10,000.00	
Interest (record, page 12)	1,159.47	
Dividends (record, page 12)	30.00	11,189.47
Net loss in 1923.....	\$ 7,998.67	

His net income in 1924 was \$20,025.00 (record, page 12). He claims the right to deduct from this \$20,025, the entire amount of his loss in 1923 in excess of his income in that year, or \$7,998.67. The Board has allowed him to deduct \$2,408.65.

The statute under which the Board claims to justify its decision is Section 204 of the Revenue Act of 1921, which reads, so far as material, in full as follows:

Sec. 204(a) "That as used in this section the term 'net loss' means only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer (including losses sustained from the sale or other disposition of real estate, machinery and other capital assets, used in the conduct of such trade or business); and when so resulting means the excess of the deductions allowed by section 214 or 234, as the case may be, over the sum of the following: (1) the gross income of the taxpayer for the taxable year, (2) the amount by which the interest received free from taxation under this title exceeds so much of the interest paid or accrued within the taxable year on indebtedness as is not permitted to be deducted by paragraph (2) of subdivision (a) of section 214 or by paragraph (2) of subdivision (a) of section 234, (3) the amount by which the

deductible losses not sustained in such trade or business exceed the taxable gains or profits not derived from such trade or business, (4) amounts received as dividends and allowed as a deduction under paragraph (6) of subdivision (a) of section 234, and (5) so much of the depletion deduction allowed with respect to any mine, oil or gas well as is based upon discovery value in lieu of cost.

(b) "If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income of such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary."

* * * * *

The appellant claims that the provisions of Section 206 of the Revenue Act of 1924 are applicable, these provisions, as far as material, reading as follows:

Sec. 206 (a) "As used in this section the term 'net loss' means the excess of the deductions allowed by section 214 or 234 over the gross income, with the following exceptions and limitations:

(1) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business;

(b) If for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called 'second year'), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called 'third year'); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * *

(e) If for the taxable year 1922 a taxpayer sustained a net loss in excess of his net income for the taxable year 1923 (such net loss and net income being computed under the Revenue Act of 1921), the amount of such excess shall be allowed as a deduction in computing net income for the taxable year 1924 in accordance with the method provided in subdivisions (b) and (c) of this section.

(f) If for the taxable year 1923 a taxpayer sustained a net loss within the provisions of the Revenue Act of 1921, the amount of such net loss shall be allowed as a deduction in computing net income for the two succeeding taxable years to the same extent and in the same manner as a net loss sustained for one taxable year is, under this Act, allowed as a deduction for the two succeeding taxable years.

The appellant by reason of his sole ownership of the capital stock of his real estate corporation, his sole management thereof, his active conduct of its

business, and his income of \$10,000 therefrom, claims that he was engaged in the real estate business in the year 1923 and that his loss sustained in his individual real estate operation in that year was sustained in the line of his ordinary business, so as to be deductible in the computation of his net loss, the net loss in turn being deductible in determining his net taxable income for 1924.

The fact should be clearly understood that the appellant is claiming as a deduction in 1924 a loss which he himself sustained in 1923. It should be further clearly understood that this loss was incurred in a transaction entered into by the appellant individually, was not a corporate transaction and is in nowise connected with the business of the corporation. The corporation enters into the consideration of the case only as the basis for appellant's claim that he was engaged in the real estate business in 1923.

The case is one of first impression so far as this Court is concerned, and aside from decisions of the Board of Tax Appeals and the Commissioner of Internal Revenue appears to be one of first impression in any Court.

There is manifestly a difference between a business carried on by an individual in his own right or as a member of a partnership and a business carried on through the medium of a corporation, even when, as in the instant case, all the stock is owned by one person and that one person is the sole active agent of the corporation. The question is whether an individual who chooses to conduct his business through the medium of a corporation is always to be regarded merely as an employee or agent of the cor-

poration, or whether he is sometimes to be regarded as engaged in the business carried on by the corporation.

Under modern industrial conditions it is a common practice for individuals to carry on their personal business activities through the medium of a corporation. Sometimes the business is small and obscure, sometimes large and well known. Perhaps the most conspicuous example is Henry Ford and the Ford Motor Company. If Henry Ford should undertake an individual venture in the automobile field and lose more than a year's income therein, could it possibly be held as a principle of law that he, known throughout the world as a dominant figure in the industry, was not engaged in the automobile business and that that single operation would be regarded for taxation purposes as an isolated transaction not connected with his regular business? The corporate form is the medium used to carry on the activity, but when completely dominated by a single individual is as much a part of his individual business activity as it would be if the business were carried on without the intervention of the corporate form.

In the course of the opinion in the Board of Tax Appeals the member calls attention to the confusion in the appellant's mind as to the transaction now before the Court and calls attention to certain testimony of the appellant in that regard, wherein the appellant says: "Well, I always felt when I bought for the corporation or myself, it was all the same."

In layman's language that is the whole point of this controversy. The appellant was not an employee of a real estate corporation; he *was* a real estate corporation, or, rather, his real estate corpo-

Vaughan 15 B.T.A. 576
 Board of Tax Appeals

ration was one of the business media which he used. It was he who was engaged in the real estate business, and it was only by chance that he retained the particular property here in question in his individual possession and retained its legal title throughout the period of its ownership. There are manifest limits to a doctrine of this sort. It is obvious that the mere officer of a substantial corporation with numbers of stockholders cannot often claim that he is personally engaged in the business which that corporation carries on, but this again turns to a considerable extent upon the relative prominence of the individual and the corporation. Mr. Carnegie was engaged in the production of iron and steel, even though he was the President of the Carnegie Steel Company. Mr. Rockefeller was engaged in the business of producing oil, even though he was the President of the Standard Oil Company. The question resolves itself into one of degree, and it is respectfully submitted that where the individual owns and controls the entire corporation its business and his business are indistinguishable for the purpose of determining the nature of the business carried on by the individual.

The second point is whether, regardless of the nature of the business carried on by the appellant, he may, nevertheless, deduct the entire loss of \$7,998.67 by reason of other provisions in the applicable Revenue Act.

The Board determines the appellant's net loss under the definition as contained in Section 204(a) of the Revenue Act of 1924. The essential difference between these two provisions is that under the provisions of Section 206(a)(1) losses which are not attributable to the operation of a trade or business

are included in the computation of the statutory net loss up to the amount of the gross income not derived from the trade or business.

If the appellant was not engaged in the real estate business in 1923, then his business in contemplation of the Act was the liquor business, all of his income was derived from sources not connected with his trade or business and the entire \$7,998.67 is deductible under the definition of the deductible net loss as contained in Section 206 of the Revenue Act of 1924.

To justify the use of the Revenue Act of 1921, in determining a net taxable income for the year 1924, reference is had to Section 206(f) of the Revenue Act of 1924, which provides that if a net loss is sustained in 1923, as defined in the Revenue Act of 1921, "the amount of such net loss" shall be allowed as a deduction in the two succeeding taxable years "to the same extent and in the same manner" as a net loss sustained for one taxable year is under the 1924 Act allowed as a deduction.

In order that the ambiguity in the above section may be clearly demonstrated, the two portions of it which appear to be ambiguous are set out in quotations above. If the reading of the section is limited to the language which refers to the year 1923 and to the net loss as defined under the Revenue Act of 1921 and then the words "such net loss" are regarded as referring back to the specific definition of a net loss under the provisions of the Revenue Act of 1921, it is clear that the Board is correct in holding that the provisions of Section 206(a)(1) have no application in determining the net deductible loss in the year 1924. If, however, the latter portion of the section be read and the words "to the same ex-

tent and in the same manner" are added, it seems to be clear that what Congress was endeavoring to do was to allow in 1924 and 1925 net losses sustained in 1923 to the same extent that they would be allowed if sustained in the year 1924 and deductible in 1925 and 1926. It is not perceived how the words "to the same extent" can be given any effect in construing this statute if they do not have the effect of bringing within the deductible loss in 1924 all of the items entering into its computation as defined by the Act of 1924. Particularly significant is Section 206(e) which provides for forwarding an excess net loss sustained in 1922 and not exhausted in 1923. In this section the words "to the same extent and in the same manner" do not occur, showing clearly that such a net loss is computed under the Act of 1921 while Section 206(f) is equally clearly differentiated by those words and in Section 206(f) the net loss is that defined by the Act of 1924. So far as material to this proceeding, the enlarging elements in the definition of net loss are confined to Section 206(a)(1) and it is submitted that under that definition, if the appellant was not in the real estate business in 1923, his entire income was derived from sources other than that business and he is entitled to a deduction in 1924 of the entire net loss sustained. In no other manner can the words "to the same extent" be given any meaning in the construction of the section here under consideration.

Respectfully submitted,

LEVI COOKE,

ALBERT E. JAMES,

Attorneys for Appellant.

No. 4821

FEB 11 1929

Henry M. Hodges
In the Court of Appeals of the District
of Columbia

APRIL TERM, 1928

LOUIS GOLDBERG, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE

APPEAL FROM THE BOARD OF TAX APPEALS

BRIEF FOR THE COMMISSIONER

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In the Court of Appeals of the District of Columbia

APRIL TERM, 1928

No. 4821

LOUIS GOLDBERG, APPELLANT,

v.

COMMISSIONER OF INTERNAL REVENUE

APPEAL FROM THE BOARD OF TAX APPEALS

BRIEF FOR THE COMMISSIONER

PREVIOUS OPINION

The only previous opinion in this case is that of United States Board of Tax Appeals (R. 10) reported in 9 B. T. A. 1355.

JURISDICTION

This proceeding involves income taxes for the year 1924 in the sum of \$720.50, and is taken from a decision of the United States Board of Tax Appeals promulgated January 17, 1928. (R. 10.) The case is brought to this court by a petition to review filed on the 16th day of July, 1928 (R. 16),

and a written agreement between the parties (R. 20), pursuant to the Revenue Act of 1926, c. 27, Sections 1001, 1002, 1003, 44 Stat. 9, 109, 110.

QUESTIONS PRESENTED

1. Can appellant take a deduction for a net loss suffered in 1923 in a single isolated business venture as a net loss "resulting from the operation of any trade or business regularly carried on" by him, within the meaning of Section 204 (a) of the Revenue Act of 1921?

2. May such a deduction be taken under Section 206 (a) (1) of the Revenue Act of 1924, which allows deductions for net losses "not attributable to the operation of a trade or business regularly carried on by the taxpayer * * * to the extent of the amount of the gross income not derived from such trade or business," when the loss occurred in 1923?

STATUTES INVOLVED

The pertinent provisions of the statutes, so far as material, are as follows:

Revenue Act of 1921, c. 136, 42 Stat. 227:

NET LOSSES

SEC. 204. (a) That as used in this section the term "net loss" means only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer (including losses sustained from the sale or other disposition of real estate, machinery, and other capital assets, used in

the conduct of such trade or business) ; and when so resulting means the excess of the deductions allowed by section 214 or 234, as the case may be, over the sum of the following; (1) the gross income of the taxpayer for the taxable year, (2) the amount by which the interest received free from taxation under this title exceeds so much of the interest paid or accrued within the taxable year on indebtedness as is not permitted to be deducted by paragraph (2) of subdivision (a) of section 214 or by paragraph (2) of subdivision (a) of section 234, (3) the amount by which the deductible losses not sustained in such trade or business exceed the taxable gains or profits not derived from such trade or business, (4) amounts received as dividends and allowed as a deduction under paragraph (6) of subdivision (a) of section 234, and (5) so much of the depletion deduction allowed with respect to any mine, oil or gas well as is based upon discovery value in lieu of cost.

(b) If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year, and if such net loss is in excess of the net income for such succeeding taxable year; the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduc-

tions in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * *

Revenue Act of 1924 (approved June 2, 1924),
c. 234, 43 Stat. 253:

NET LOSSES

SEC. 206. (a) As used in this section the term "net loss" means the excess of the deductions allowed by section 214 or 234 over the gross income, with the following exceptions and limitations:

(1) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business:

* * * * *

(b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all

cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * *

(e) If for the taxable year 1922 a taxpayer sustained a net loss in excess of his net income for the taxable year 1923 (such net loss and net income being computed under the Revenue Act of 1921), the amount of such excess shall be allowed as a deduction in computing net income for the taxable year 1924 in accordance with the method provided in subdivisions (b) and (c) of this section.

(f) If for the taxable year 1923 a taxpayer sustained a net loss within the provisions of the Revenue Act of 1921, the amount of such net loss shall be allowed as a deduction in computing net income for the two succeeding taxable years to the same extent and in the same manner as a net loss sustained for one taxable year is, under this Act allowed as a deduction for the two succeeding taxable years.

* * * * *

EFFECTIVE DATE OF ACT

SEC. 1104. Except as otherwise provided, this Act shall take effect upon its enactment.

STATEMENT OF FACTS

Appellant is a resident and citizen of the State of New York.

In 1915 appellant organized a New York corporation to engage in the business of buying, sell-

ing, and renting real estate. From 1915 to and including 1923 petitioner was president, treasurer, and the sole stockholder of the corporation. He was actively engaged in the management of his affairs. In some instances appellant entered into real estate contracts in his own name and transferred them later to the corporation. In 1920 he purchased in his own name a house and lot for which he paid \$37,500 and a commission of \$500, or a total purchase price of \$38,000. He believed at the time that this property was a good investment and that with certain improvements upon the building he could sell it at a good profit. The large dwelling house of about twenty rooms upon the lot was in a very dilapidated condition. (R. 11.) Appellant considered the value of the land to be equal to the price paid for the entire property. He practically reconstructed the house—the additions and improvements costing \$56,233.74, making the total cost of the property when sold in 1923 \$94,233.74. The property was sold in 1923 for a net price of \$74,150 after payment of the commissions and other necessary expenses of sale. The exhaustion, wear and tear of the building during the period of ownership by the petitioner was \$3,374. The loss sustained upon the sale was \$16,709.74. (R. 12.) The purchase in 1920 and sale at a loss in 1923 of the house and lot in New Jersey is the only real estate transaction in which appellant engaged as an individual over a period of nine years. (R. 14.)

During the year 1923 appellant received a salary from the corporation of which he was president of \$10,000, interest of \$1,159.47, and dividends of \$30, making a total of \$11,189.47. He paid local taxes of \$69.75, leaving a net income of \$11,119.72. Appellant's net income for the year 1924 was \$20,025. (R. 12.) He claims the right to deduct from income for 1924 the entire amount of his loss in 1923 in excess of his income for that year, or \$7,998.67. (R. 3, 18.) The Board allowed a deduction of \$2,408.65 (R. 15, 18), arising out of another claim.

The Board held that the loss on that single sale was not a loss resulting from a trade or business regularly carried on by the appellant, and was not such a loss as may be used in determining a net loss which may be deducted from income under the Revenue Act of 1924. (R. 15.) The appeal is from that decision. (R. 18.)

SUMMARY OF ARGUMENT

The appellant suffered a loss on the buying and selling of a piece of property. This transaction was individual to the appellant and not customary with him. The appellant can not validly urge an identity between a real estate corporation regularly engaged in the business of buying and selling property, and of which he was the sole stockholder and officer, and himself so as to secure the deduction allowed by Section 204 of the Revenue Act of 1921. Such a corporation was created by him but, in the eyes of the law, there is a complete separation be-

tween a corporate entity and the individuals comprising its stockholders or officers. As the statute provides for the allowance of deductions only to the extent that they are incurred in a regular trade or business, their benefit can not be claimed by appellant. Neither can he claim benefits arising under the Revenue Act of 1924, as Section 206 (a) (1) is not retroactive in effect, and Section 206 (f), contemplating losses for the year 1923, provides that they be losses cognizable under the Revenue Act of 1921.

ARGUMENT

I

Appellant is not entitled to a deduction for a loss growing out of a single isolated business venture as a loss "resulting from the operation of any trade or business regularly carried on" under Section 204 (a) of the Revenue Act of 1921

The facts reveal that the appellant was regularly engaged in the liquor business in 1923 and that he was president, treasurer, and sole stockholder of a corporation engaged in the real estate business and had active charge thereof. In 1920 he purchased, not in the name of the corporation, but individually, a certain piece of property on which at the sale in 1923 he realized a net loss of \$16,709.74. (R. 12.) This loss he asks that he be allowed to deduct. The Board of Tax Appeals has determined that this purchase and sale was the only individual venture that appellant had made in over

nine years, and that it was not sustained by appellant while engaged in a regular trade or business. (R. 14.) The question here for determination then is as to his right to take a deduction for a loss which obviously did not occur in his regular trade or business. It is suggested that this contention may only be answered in the negative. Section 204 (a) in defining the net losses which are allowed under Section 204 (b) very distinctly and unequivocally limits them to "only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer." Appellant would answer this by claiming an identity between the corporation which was regularly engaged in buying and selling of real estate and himself.

It is submitted that such a contention finds little weight in reason or precedent. It is true that the identity of individuals with corporations is sometimes resorted to by the court to uncover fraud, or compel equity to be done. However, it is submitted that appellant is not entitled to invoke such a doctrine for the purpose of serving himself and defeating the taxes levied by the government. It is elemental that taxing statutes are not to be construed as equity questions may be but, to the contrary, with a strong regard for the actual import of the words of the statute. It can not be supposed in this connection that Congress limited the deduction to losses growing out of a regular trade or busi-

ness unless it was intended to exclude thereby all other losses. It would seem clear that Congress desired to stimulate the regular trade or business by allowing this deduction and that this allowance did not extend beyond the regular trade or business. Neither can it plausibly be said that the appellant was regularly engaged in such a business. The evidence disclosed that appellant had created a corporation to relieve himself of the necessity of personally engaging in this business and having taken the benefits of such a privilege, it is submitted that he must take with them the burdens. Had a large gain resulted from this isolated sale it can not be imagined that taxpayer would not strenuously resist an identity between the corporation and himself which would force him into a higher tax bracket.

II

Appellant may not take a deduction for such a loss under the provisions of Section 206 of the Revenue Act of 1924

Appellant urges in the alternative that, if he is not allowed the deduction under the Revenue Act of 1921, he still may take it under Section 206 of the Revenue Act of 1924. It is believed that an analysis of this Section will show clearly the impossibility of his invoking the benefits of this latter act. Section 206 (f) provides that:

If for the taxable year 1923 a taxpayer sustained a net loss *within the provisions of*

the Revenue Act of 1921, the amount of such net loss shall be allowed as a deduction
* * *. (Italics ours.)

It is apparent from the wording of this section that the net loss must be such a net loss as is contemplated in the Revenue Act of 1921. It would seem that there is no other possible construction as the language is clear and unambiguous in providing that the net loss be within "the provisions of the Revenue Act of 1921." It must necessarily follow that if appellant was not entitled to a deduction under the Revenue Act of 1921, he can not now invoke Section 206 (f) of the Revenue Act of 1924 to aid him in securing the deduction asked.

He further urges, however, that his claim is embraced within the provisions of Section 206 (a) (1). This section provides that a net loss means the excess of the deductions allowed over the gross income, limited to the extent that the deduction not attributed to a regular trade or business shall be allowed only to the extent of the amount of the gross income not derived from such a trade or business. He then compares the effect of Section 204 (a) of the Revenue Act of 1921 with Section 206 (a) (1) of the Revenue Act of 1926, and draws the conclusion that the only difference between these sections is that whereas the Revenue Act of 1921 only allows deductions for losses growing out of the regular trade or business, the Revenue Act of 1924 is broader to the extent that it also allows deductions

for losses outside of the regular trade or business up to the amount of gross income so derived. His conclusion from this is that this section may be invoked to cover his loss in the year 1923. While a casual examination of subsection 206 (a) (1) without relation to the section as a whole may seem to support this view, it is believed that accepting the section as a single entity and examining each of its parts will clearly reveal the basic fallacy of this contention. As heretofore adverted to, Section 206 (f) specifically provides that losses occurring in the year 1923 be such as were recognized by the Revenue Act of 1921. Section 206 (e) makes similar provision for losses occurring in the year 1922. If these sections have any meaning at all, it is perfectly obvious that Section 206 (a) (1) can not have any retroactive effect. It must of its very nature contemplate only such losses as arise after the effective date of the Revenue Act of 1924. If this be not true, then the latter subsections are utterly redundant and superfluous.

CONCLUSION

Therefore, it is respectfully urged that appellant has not shown himself to be regularly engaged in the business of buying and selling real estate; that a loss so incurred can not be deducted under the provisions of the Revenue Act of 1921 and that as Section 206 (a) (1) has no retroactive effect, the deci-

sion of the United States Board of Tax Appeals
should be affirmed.

Respectfully,

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